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ABSTRACT

Forensics program administration raises a number of troubling liability concerns. The potential liability exposure of forensics administrators may vastly exceed the litigation risks that arise as a result of ordinary teaching duties. Potential liability exposure may result from the failure of program directors to act in accordance with college or university rules or procedures, state or local laws and regulations, or the non-codified mandates that have been adopted by particular forensics squads. A number of forensics educators have called attention to troubling questions such as the use of gender-biased language in speech and debate rounds, and the relative under-representation of female directors of forensics. In this area, peer harassment is pernicious and much more common than faculty-to-student harassment. Further, the great demands that tournament participation requires of students--missed classes, deadlines, etc.--raise possible claims for educational malpractice by students against coaches. These claims might be based on a failure to establish and enforce squad academic standards and requirements. Additional concerns arise with respect to use of alcohol and drugs by students, especially while attending forensics tournaments. Also, several highly publicized cases have heightened the awareness of copyright issues on campus. A central tenet that runs through this research is that program directors should be proactive, and should know and understand the policies and regulations of their own institutions. (Contains 32 notes.) (TB)

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Liability Implications of Forensics Program Administration

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TO THE EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)

Forensics program administration raises a number of troubling liability concerns. The potential liability exposure of forensics administrators may vastly exceed the litigation risks that arise as a result of ordinary teaching duties. In this essay, we explore the various theories under which speech and debate program directors may face legal liability. Next, we consider some specific fact situations which may give rise to liability. Finally, we discuss several preventative strategies that program directors may wish to implement in an attempt to forestall possible litigation, and overview the importance of understanding the coverage provided by college or university insurance policies, and the possible need for individual program directors to carry additional personal liability insurance.

This essay is intended to provide a framework for educators to assess gaps in their protection from liability suits. Because educational institutions vary widely in size, structure, and the degree to which policies and regulations are formalized, our comments should be taken as general recommendations, and educators should raise these issues with their own departments, deans, administrations, and legal counsel. The legal questions that emanate from school-related suits are constantly evolving, and seldom specific to forensics. Nevertheless, we will refer to case law whenever possible in an attempt to illustrate the range of legal issues that program administrators should consider.

Liability Concerns for Program Directors

Potential liability exposure may result from the failure of program directors to act in accordance with college or university rules or procedures, state or local laws and regulations, or the non-codified mandates that have been adopted by particular forensics squads. Lawsuits against individuals or universities may arise from negligence on the part of the program director or subordinates in discharging the wide range of duties associated with travel, research, and supervision of students.

Because program directors interact with students in ways that are much more involved than their faculty colleagues, they may be presented with situations that their departments have not foreseen, and for which they are ill-prepared to respond. A claim of negligence requires that an actor breach a duty of care he or she owes to another. The duty of care giving rise to negligence is generally that of an ordinary, prudent person. Consequently, forensics educators must first be cognizant of circumstances where ordinary negligence could occur such as automobile accidents occurring during travel to a forensics tournament. Legal analysis in such situations does not differ from that normally encountered.

In addition, the unique relationship forensics educators have with students may give rise to a heightened duty of care. The duty of care owed by a college or university to a student was once governed by the doctrine of *in loco parentis*, placing

college and university administrators in the position of guardians of a student's physical and moral well-being.[1] Use of the *in loco parentis* doctrine declined in the 1960's as students began demanding greater independence from regulation and control.[2] However, students and universities still have a relationship of mutual dependence which can raise special issues. At the same time, courts have noted that college students are adults and educational institutions are not insurers of their students.[3] This general framework should be kept in mind when evaluating particular situations of liability.

Sexual Harassment

Awareness of sexual harassment and gender-based discriminatory practices has drastically increased during the past decade within the forensics community. A number of forensics educators have called attention to troubling questions such as the use of gender-biased language in speech and debate rounds, and the relative under-representation of female Directors

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1 Timothy Davis, Examining Educational Malpractice Jurisprudence: Should a Cause of Action be Created for Student Athletes? 69 Denver University Law Review 57, 83 (1992).

2 Robert Evans, "A Stranger in a Strange Land": Responsibility and Liability for Students Enrolled in Foreign-Study Programs, 18 Journal of College and University Law 299, 300-02 (1991); University of Denver v. Whitlock, 744 P.2d 54, 59 (Colo. 1987).

3 Tia Miyamoto, "Liability of Colleges and Universities for Injuries During Extracurricular Activities," Journal of College and University Law, 15:299, 300-02 (1991).

of Forensics. In addition, most faculty members are already aware of the consequences of their own behavior in this regard.[4]

Program directors (or the colleges and universities they represent) may be held liable for their failure to prevent "student-to-student" harassment, or harassment stemming from the improper behavior of subordinates, hired judges, assistant coaches and so forth. Thus, forensics program administrators should view sexual harassment and gender-discrimination in a broader context. There is no uniform definition of sexual harassment, but it may include "unwanted sexual attention from peers, subordinates, supervisors or customers, clients or anyone the victim may interact with to fulfill school or job duties where the victim's responses are restrained by fear of reprisals."[5] Although most educational institutions have clearly established policies to prevent or eliminate faculty-to-student sexual harassment, few have specifically examined the issues of peer-harassment or harassment committed by indirect agents of the college or university.

Peer harassment is pernicious and much more common than faculty-to-student harassment. Several studies conducted in high

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[4] Walter Connolly Jr. & Allison Marshall, "Sexual Harassment of University of College Students by Faculty Members," Journal of College and University Law, 15:4, (1989).

[5] Massachusetts Board of Education, Who's Hurt and Who's Liable: Sexual Harassment in Massachusetts Schools, (Boston, MA: Massachusetts Department of Education, 1986), 9.

schools concluded that "young women are much more likely to be the victim of sexual harassment than young men,"[6] and that sexual-orientational harassment is widespread. Consistent results have been obtained in higher-education surveys. In one study, 12.7% of 245 women surveyed reported that they had experienced sexual harassment, 21% reported that they had not enrolled in a course because of it, and 2.6% reported that they had dropped a course as a result of the harassment.[7] Studies conducted at Cornell, MIT and the University of Rhode Island each reported significant levels of peer sexual harassment.[8]

Peer sexual harassment raises troubling questions for program directors because it extends their responsibility to prevent unwelcome behavior or comments to situations where they are not immediate parties. Several recent court cases have applied work-place theories of sexual harassment as a remedy for student-to-student misconduct.[9] As a result of rulings such as

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[6] Monica Sherer, "No Longer Just Child's Play: School Liability Under Title IX for Peer Sexual Harassment," University of Pennsylvania Law Review, 141, (1993), 2178.

[7] Ronna Schneider, "Sexual Harassment and Higher Education," Texas Law Review, 65, (1987), 525.

[8] At Cornell, 78% of the women surveyed reported peer sexual harassment, compared with 92% at MIT and 70% at the University of Rhode Island. See Jane Gross, "Schools are Newest Arenas for Sex-Harassment Issues," New York Times, (11 March 1992: B8).

[9] The Supreme Court has compared students to subordinates and teachers to supervisors, opening the door to work-place remedies in peer harassment situations. See

these, administrators, like employers, can be held liable for the behavior of subordinates that they "knew or should have known" would be injurious to the victim.[10]

Although existing case law in this area primarily focuses upon public elementary and high schools, program directors would be ill-advised to ignore potential responsibility for peer harassment in higher education contexts. As Elizabeth Grant argued in the Dickinson Law Review, "the problem of student-to-student harassment in the schools is not going to disappear."[11]

Because students work and travel in close proximity to one another, difficult situations which may constitute harassment can arise. Directors should be watchful for potential problems, take complaints seriously and instruct subordinates to be sensitive towards harassment. Directors should consider establishing policies prohibiting inappropriate assistant coach-student relationships.

Franklin v. Gwinett County Public Schools, 112 S. Ct. 1028, 1037 (1992); Doe v. Petaluma City School Dist., 830 F. Supp. 1560 (N.D. Cal. 1993); and Elliot v. New Miami Bd. of Educ., 799 F. Supp 818 (S.D. Ohio 1992).

10 Ellison v. Brady, 924 F.2d 872, 881 (9th Cir. 1991).

11 Elizabeth Gant, "Applying Title VII "Hostile Work Environment" Analysis to Title IX of the Education Amendments of 1972 -- An Avenue of Relief for Victims of Student-to-Student Harassment in the Schools," Dickinson Law Review, 99, (Spring 1994), 515.

Educational Malpractice

The competitive nature of many forensics teams places great time demands upon students. Tournament travel may force students to miss up to three days of class per week and the demands of research and practice often compel students to skip class, turn in assignments late and fail to prepare adequately for examinations. As a result, gifted, intelligent students may receive grades which are far below expectations or fail to complete their education in a reasonable time.

These circumstances raise possible claims for educational malpractice by students against coaches. These claims might be based on a failure to establish and enforce squad academic standards or requirements. Students may also assert that the pressure to perform on the forensics squad forced students to be unable to complete academic studies.

Claims of educational malpractice are typically brought against institutions by students involved in athletics who graduate without academic skills.[12] Courts have uniformly rejected this kind of claim at the appellate level;[13] however, significant risk is still present, especially because debate students may be recruited to a campus with promises of academic success. A formal policy requiring minimal academic achievement

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[12] See Ross v. Creighton University, 740 F.Supp. 1319 (N.D.Ill. 1990).

[13] Davis, 59.

to remain on the squad that is not enforced could lead to more liability issues than if no policy were in place.

The way for educators to avoid liability, as well as do a great service to students, is to establish firm guidelines for academic performance, and be attentive to a student's missed classes and status of assignments, especially for potentially problem students. Directors should communicate with a student's professors about missed classes and the need to do make-up work.

Alcohol and Drug Use

Additional concerns arise with respect to use of alcohol and drugs by students, especially while attending forensics tournaments. Several scenarios provide particularly acute liability issues: underage drinking sanctioned or sponsored by coaching staff or the director; drinking or drug use by coaching staff while responsible for student safety; or, drug use with knowledge of forensics staff.

Courts have addressed this issue with respect to university liability for drinking by students at school sponsored events. Even though liability has not frequently been imposed upon educational institutions, the reason is usually that the college was unaware of the activity.[14] When a forensics educator is involved or participating in the conduct, the risks multiply.

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[14] Kellogg v. Ohler, 825 P.2d 1346 (Okla. 1992); Alumni Ass'n, Delta Zeta Zeta of Lambda Chi Alpha Fraternity v. Sullivan, 572 A.2d 1209 (Pa. 1990)

This potential liability can be avoided by strict policies which prohibit drinking by students participating in forensics activities. Again, the policy must be enforced to protect the educator from liability. At the very least, a policy prohibiting underage drinking and drug use should be in place and strictly enforced.

Copyright Infringement and Fair Use

Several highly publicized recent cases have heightened the awareness of copyright issues on campus.[15] Because speech and debate teams rely heavily upon the photocopied documents to prepare for competition, some educations have expressed concern regarding possible violation of Federal copyright regulations.

Fortunately, most programs need not seriously worry about litigation arising as a result of copyright infringement. The so-called "fair use" doctrine recognizes the utility of photocopying copyrighted material when conducting academic research, and does not universally require prior permission from the copyright holder. Codified in 1976, "fair use" permits the limited reproduction of copyrighted work providing that the following conditions are satisfied: (1) the copyrighted material is clearly marked as copyrighted; (2) the reproduced passages are brief, when considered within the context of the work as a whole (a generally accepted guideline is ten percent of the total work,

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[15] Basic Books v. Kinko's Graphic Corp., 758 F.Supp. 1522 (S.D.N.Y. 1991).

or 1,000 words, whichever is less); (3) the reproduced passages are "spontaneous" (the decision to reproduce is made by the individual teacher, and is not a response to a request made by a supervisor); and, (4) the act of reproducing the material does not have the cumulative effect of diminishing the market for the copyrighted work.[16] One additional, and extremely important assumption of the fair use doctrine is that the reproduced material is not sold or marketed. If the material is offered for resale, it would be advisable to seek permission from copyright holders in advance.

The fair use doctrine also distinguishes between materials that are reproduced by professors for the purpose of classroom preparation, and those that are directly distributed to students. Out of print materials are more easily reproduced, and many non-profit organizations include blanket copyright waivers for the classroom use of their publications.

In most circumstances, speech and debate students obviously meet the conditions specified in the fair use doctrine. Quoting material during the course of a speech, or preparing briefs for a debate round are clearly protected activities. The right to photocopy materials in a library is also specifically protected

in the copyright act, and students need not fear litigation as

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[16] Kenneth Murray, "Copyright and the Educator," Phi Delta Kappa, 75:7, (March 1994), 554.

the result of preparing for competition.[17]

Professors who attempt to circumvent the provisions of the fair use doctrine by placing items on reserve in a library may still be held in violation of the act and are potentially liable for damages to the copyright holder. When used in preparing classroom materials for distribution, however, the issue is considerably more complicated. "By reproducing handouts for students rather than buying the books, periodicals or other needed materials," writes Kenneth Murray, "educators may run afoul of the law."[18] To avoid these problems, administrators should consult with their campus bookstores or reproduction centers for assistance in adhering to the fair use doctrine.

Programs that produce, distribute, and sell copyrighted material in the form of handbooks, guidebooks, or prepared briefs are almost certainly in violation of the fair use doctrine and do so at considerable risk. Personal liability exposure in this regard is heightened if the handbook revenue is not collected by the college or university, and is not included as a part of the coaches' compensation package. The use of commercial electronic databases in researching handbooks is often expressly forbidden in the subscriber agreement, and electronic publishers are

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[17] Robert Kasunic, "Fair Use and the Educator's Right to Photocopy Copyrighted Material for Classroom Use," Journal of College and University Law, 19:3, (1992), 273.

[18] Murray, 552.

somewhat zealous in protecting their intellectual property rights from infringement. Because the materials are offered for sale, the fair use doctrine does not protect administrators from possible litigation by copyright holders who seek to recover royalties or lost revenue as a consequence of handbook sales. Programs that receive a significant amount of revenue from handbook sales should consult with a lawyer to insure that they are not in violation of the copyright act.

Proactive Strategies to Limit Liability

A central tenet that runs throughout our research in this area is that program directors should be proactive, and should know and understand the policies and regulations of their own institutions. Whenever possible, formalized regulations should be made clear to students, and they should be provided with copies of pertinent policies as each new season begins. Directors should speak with college or university officials who oversee insurance and should obtain copies of college liability policies. It is crucially important that directors enforce any policy in place whether university-wide or program specific.

Many institutions have formal substance abuse policies, anti-discrimination regulations, and student or faculty codes of conduct. Gustavus Adolphus College, for instance, has enacted a variety of regulations that govern the behavior of students and faculty members in all college-sponsored activities. Pursuant to the Drug Free Schools Act of 1989, the college enacted a standard

of conduct that "prohibits the unlawful possession, use or distribution of drugs and alcohol by students and employees on its property or as any part of its officially sponsored activities."[19]

Gustavus has also codified regulations pertaining to services for students with disabilities,[20] sexual, racial, religious or orientational harassment or discrimination,[21] the privacy and confidentiality of student records or counseling information,[22] and general codes of conduct for students[23] and faculty members.[24] In each of these areas, the college offers

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19 Gustavus Adolphus College, The Drug Free Schools Act, (St. Peter, MN: Gustavus Adolphus College, 1994), 1.

20 The regulations read, in part, "No otherwise qualified person with a disability, on the basis of that disability, will be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity at Gustavus Adolphus College." Gustavus Adolphus College, Services for Students With Disabilities, (St. Peter, MN: Gustavus Adolphus College, 1994), 1.

21 Gustavus Adolphus College, "Non-Discrimination Policy," Gustavus All-College Policies, (St. Peter, MN: Gustavus Adolphus College, 1994), 12.

22 Gustavus Adolphus College, "The Family Educational rights and Privacy Act," Gustavus Adolphus All-College Policies, (St. Peter, MN: Gustavus Adolphus College, 1994), 10.

23 Gustavus Adolphus College, Handbook of Conduct for Students, (St. Peter, MN: Gustavus Adolphus College, Revised 1994).

24 Gustavus Adolphus College, Handbook of Conduct for Faculty and Staff, (St. Peter, MN: Gustavus Adolphus College, Revised 1994).

training to faculty and staff who wish to address specific issues that may arise as a result of their duties. Many of the policy statements also describe the process for handling grievances and any additional on-campus resources that may be available for students, faculty and staff.

Another important proactive strategy is the development of a program mission statement that articulates the goals of the forensic program and outlines any conditions that may be attached to participation in forensics activities. Some of the issues that a program mission statement might address include: the minimum grade point average and course-credit load required for participation in forensics, a syllabus that outlines the procedures for completing assignments and for evaluating student work if forensics participation is counted as course credit, a release form that signifies a desire on the part of students to participate in forensics-related activities, the expectations for student behavior on tournament-related travel, and, in some cases, specific goal-oriented agreements between the program director and individual students that identify specific areas of concern.[25]

It cannot be emphasized enough that directors must strive to

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[25] For instance, if a student has been placed on academic or disciplinary probation, he or she may be asked to sign an agreement with the Director of Forensics that explicitly identifies the conditions under which participation in speech or debate activities is possible.

enforce any policy in place. If a policy is developed, but violations are permitted or condoned, potential legal liability could be greater than if no policy was in place. By far the safest route is to clearly make policies and then enforce them diligently.

Liability Insurance

Forensics educators must give consideration to the liability coverage held by the college or university. Program directors should discuss insurance matters with relevant administrators. There are five main types of liability insurance available to educational institutions: primary insurance, self-insurance, excess insurance, reinsurance, and directors and officers insurance. Each of these policies contain subtle differences, and program directors should determine the exact nature of the coverage provided by their institutions.

Primary insurance provides threshold coverage, and normally includes a defense obligation "that does not exhaust the basic policy limit."[26] In other words, the coverage requires the insurance provider to pay for the costs of defending actions, and defense costs are not subtracted from the face value of the policy. Many policies include small deductibles, but the presence of a deductible often does not preclude the responsibility of the insurance company to manage defense claims.

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[26] Byron Higgins and Edward Zulkey, "Liability Insurance Coverage: How to Avoid Unpleasant Surprises," Journal of College and University Law, 17:2, (1990), 126.

Self-insurance policies range from "having no insurance at all," to having an excess policy to cover large losses. "In almost all instances," write Higgins and Zulkey, "self-insurance means that the insured takes the responsibility for its initial defense obligation, including choice of counsel."[27] Many large universities and public higher-education institutions are self-insured. Self-insurance policies may require additional scrutiny by program administrators insofar as the "front-end" costs of defending actions may fall upon the institution itself, or the individual faculty member as a named party to the suit.

Excess insurance is a policy that takes effect only after the payment of a pre-determined sum in a liability judgement.[28] The policies can be written so as to never provide a defense obligation, or to "drop down" in certain conditions when the underlying insurance does not apply or has been exhausted. Policies of this nature are normally triggered only in large-sum liability actions, and are viewed by colleges and universities as additions to their routine liability policies.

Directors and officers policies are designed to insulate administrators from liability consequent to their official duties as representatives of the college or university. Program directors, particularly those who do not serve on regularized, full-time faculty lines, should confirm that they are in fact

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[27] Higgins and Zulkey, 125.

[28] Higgins and Zulkey, 125.

considered "directors and officers" when discharging their responsibilities in speech and debate activities. Some directors and officers policies do not include a duty to defend, while others may require those charged to pay up-front costs and be reimbursed by the insurer at a subsequent date.

In addition to determining what type of liability coverage the college or university provides, program administrators should closely examine the policy to ascertain whether there are any exclusions or liability limits. If the college or university is self-insured, directors should understand whether the policy requires that personal liability insurance be exhausted prior to coverage by the institution. If the institution is state-run, the director should ascertain the conditions under which they are considered "agents" of the institution[29] and any possible liability limitations imposed by state law or sovereign immunity.

Finally, directors should review their own liability insurance. In addition to coverage from stemming from personal or automotive policies, it might be advisable to carry additional liability insurance. The National Federation of Interscholastic Speech and Debate Associations offers a one-million dollar personal liability policy to its members as part of their annual ten-dollar membership fee. Judges, assistant coaches and other

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[29] For instance, directors should know whether or not they are acting as agents when requesting students to travel, conduct off-campus research, and so forth.

staff-members can also receive coverage.[30]

Summary and Conclusion

For those faced with liability suits, litigation is often an unpleasant, time-consuming, and disruptive occurrence. Unfortunately, college and university professors can no longer assume that they are immune to being sued. Nationwide, the number of suits filed against colleges and universities continues to increase. Lawyers at several colleges report that they are experiencing an increase in "nuisance suits," filed by students or their representatives who view large institutions as easy marks.[31] There is little reason to believe that this trend will be abated in the years to come.

In this essay, we have outlined some of the areas in which liability exposure may arise, and we have identified several strategies to prevent possible litigation. Each college and university is, however, distinct, and we remind readers to check with their own institutions to determine the appropriateness of

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[30] The policy reads, "Members are covered during the time they are acting in the capacity of a school interscholastic speech, drama or debate director or judge or attending any meeting sponsored by a national, state or local speech, drama or debate association specifically designated for speech, drama or debate directors or judges." National Federation Interscholastic Speech and Debate Association, Membership Information 1994-1995, (Kansas City, MO: NFISDA, 1994), 1. For information, contact the NFISDA, 11724 N.W. Plaza Circle, P.O. Box 20626, Kansas City, MO., 64195-0626, (816)646-5400.

[31] Ben Gose, "Lawsuit Feeding Frenzy," The Chronicle of Higher Education, (17, August 1994: A27).

our suggestions.

In addition, we wish to emphasize yet again that although the existence of clearly defined and enforced squad-related policies may help to prevent situations in which liability might arise, such policy making is not without legal risk. If formal policies are announced to squad-members, but not enforced by coaches, judges, or administrators, the legal situation may be more detrimental than if no such policies existed. Moreover, the mere existence of formalized policies can create causes of action if the policies are vaguely worded or poorly planned. "If colleges decide to regulate students behavior more tightly," writes Ben Gose, "the courts will have more reason to find colleges liable when accidents occur."[32] Ultimately, program directors, coaches and administrators may find that their best defense against possible liability exposure may reside in their ability not only to communicate squad guidelines and institutional policies clearly to students, but to enforce those policies fairly and effectively.

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[32] Gose, A28.